In the Court below the learned trial Judge discussed at length many issues in the case, but nowhere did he discuss the credibility of the dead woman.

Held: in the circumstances of the case the Court of Appeal were forced to the conclusion that the learned trial Judge did not apply his mind to the vital issue in the case, namely whether the credibility of the deceased could be relied on in this case. Thus the Court of Appeal were compelled to say that the conviction could not stand and it must be set aside.

COURT OF APPEAL (CRIMINAL).

David Marshall for the appellant.

Hamzah bin Dato Abu Samah (Deputy Public Prosecutor) for the respondent.

Thomson C.J. (delivering oral judgment): This appellant was prosecuted at the Johore Assizes on a charge that on 14th October, 1961, at Segamat he did, with intent to cause miscarriage of a woman named Pang Ngee Moi, an act which caused the death of the said woman and he thereby committed an offence punishable under section 314 of the Penal Code.

He was convicted of that offence and sentenced to four years' imprisonment.

Against that conviction he has now appealed.

There was in the case a great deal of evidence which, if it was true, was capable of supporting the conviction. In view, however of the conclusions at which we have arrived, it is not necessary and indeed would be undesirable to discuss that evidence in any detail.

The only observation we have to make regarding it is that the only evidence which unequivocally connected the accused the appellant with the subsequent abortion and death of the woman Pang Ngee Moi consisted of statements made by that woman to her husband and to the doctor at the hospital prior to her death. These statements were admitted in evidence bv reason of the provisions of section 32 of the Evidence Ordinance, 1950 and once they were admitted they became evidence of the facts contained in them. They were the voice of the woman speaking from beyond the grave. They were the substitute for the oral evidence which she could have given had she been alive.

We have examined the judgment of the trial Judge with very great care. He discusses at very great length and with considerable perspicuity a number of issues in the case. He discusses the medical evidence at length and comes to certain conclusions regarding it. He discusses the credibility of the woman's husband and comes to a certain conclusion regarding it. He discusses the credibility of the appellant and comes to certain conclusions regarding it. But nowhere does he discuss the credibility of the dead woman. In the circumstances and having regard to the care and detail with which he clearly applied his mind to the other issues in the case, we are forced to the conclusion that he did not apply his mind to the vital issue in the case, which was: did that voice from beyond the grave speak the truth? was it to be relied upon?

We are thus compelled to say that the conviction cannot stand and it must be set aside.

That is not the end of the matter. We have to consider what course the interests of justice now require should be taken. In the case there is an allegation, and I say no more than that regarding it, that a very serious offence against the public welfare and against the criminal law of this country has been committed. That allegation calls for the exercise of the judicial function regarding it. It follows from what has been said that that function has not been exercised by the trial Judge. We ourselves are unable to exercise it because though we are in as good a position as was the trial Judge to assess the value of what I have called the voice from beyond the grave that voice has to be heard with other voices and particularly the living voice of the appellant which we have not heard.

In the circumstances we are of the opinion that the interests of justice demand that the judicial function should be exercised by another Judge.

We accordingly order a re-trial.

Re-trial ordered.

Re KARUPAYA DECD.

[O.C.J. (Ismail Khan J.) November 17, 1961]

[Raub — Originating Motion No. 3 of 1961]

Probate and Administration — Application for leave to depose in a petition for probate and Letters of Administration death of deceased — Death not in doubt.

Where the fact of death is not in doubt, and the applicant can swear that death had occurred, no order is required on any application for Probate or Grant of Letters of Administration to swear that death had taken place.

Case referred to:—

(1) *In the Estate of Cecilia Long-Sutton* [1912] P. 97.

MOTION.

The applicant appeared in person.

Ismail Khan J.: This was an application by way of motion for an order giving leave to depose in a petition for Probate or Letters of Administration or distribution in respect of the estate of one Karupaya s/o Muniandi that the death of the said Karupaya occurred on the 17th day of February, 1950 at Sathnakottai Village, Ramnad District, South India.

In support of his application the applicant filed two affidavits, one his own and the other by a relative of the said Karupaya, one Raju s/o Vellasamy of No. 7, Mason Road, Raub. It would appear from these affidavits that the said Karupaya left for India in 1947 and went to live in his village Sathnakottai where he died on the 17th day of February, 1950. Both the applicant

and his co-deponent attended the funeral. They saw the dead body of the deceased being bathed and wrapped in white cloth according to Hindu rites.

It seems to me that such an application for leave to swear the death of a person on an application for Probate or Letters of Administration to his estate would be appropriate in cases where the applicant is unable to swear in his oath to the death of the deceased and there is no direct evidence of his death, but only evidence from which his death may be presumed to have taken place, e.g. from his disappearance at or after a given time and from the circumstances attending such disappearance or from his not having been heard of for a prolonged period by those with whom he might reasonably have been expected to communicate. (See *Tristram and Coote's* Probate Practice, 21st edition, page 522). In such cases the fact of death is not certain, but there are only the circumstances from which it may be presumed. Where, however, the fact of death is not in doubt, and the applicant can swear that death had occurred, no order is required on any application for Probate or Grant of Letters of Administration to swear that death had taken place. (See *In the Estate of Cecilia Long-Sutton* (1)). In that case a lady, one Cecilia Long-Sutton, had disappeared on 23rd December, 1909, and her dead body was recovered from a river on the 29th of the same month. A sister of the deceased, an executrix under her will, applied for an order giving leave to swear the death of the said Cecilia Long-Sutton as having occurred between 23rd and 29th December, 1909. No order was made on her application, the President, Sir Samuel Evans, observing:—

"In this case the grant could have been obtained in the registry on swearing that the deceased is dead, and that she died between December 23 and 29, 1909. I think, in strictness, that the oath should be that the deceased died on December 23 or 29, 1909, or on some day between those dates. I make no order on this application."

It is clear from the affidavits in this case that not only is the fact of death not in doubt, but even the actual date of death is known. Therefore, all that the applicant need do is to swear on his application for Probate or Letters of Administration or distribution (in the case of a small estate) in respect of the estate of the deceased that he died on the 17th day of February, 1950.

I therefore made no order on the application.

No order made.

MOHAMED EKRAM v. PUBLIC PROSECUTOR

[A. Cr. J. (Ismail Khan J.) November 17, 1961]

[Raub — Criminal Appeal No. 10 of 1961]

Criminal Procedure — Adjournment — Illness of counsel — Refusal to adjourn trial on the ground that "there had been many postponements already."

In this appeal it was urged on behalf of the appellant that he had retained counsel to defend him in a private summons but on the day of the trial his counsel was ill. Two days before the trial his counsel had sent a letter along with a medical certificate to the learned Magistrate and counsel for the respondent had also been informed. The Magistrate, however, refused an application for an adjournment at the trial on the ground that "there had been many postponements already." There had been several adjournments before counsel were engaged but there is nothing in the record to indicate at whose request they were made. Since counsel were engaged there had also been several adjournments until the case was finally fixed for hearing.

Held: a postponement is not automatic following the production of a medical certificate to account for absence of counsel. Each case should be considered on its merits. In the circumstances of this case, appeal would be allowed. Re-trial ordered.

CRIMINAL APPEAL.

Dato R. P. S. Rajasooria for the appellant.

Sheikh Abdul Rahman (Deputy Public Prosecutor) for the respondent.

Ismail Khan J.: The appellant was charged at the Magistrate's Court, Kuala Lipis, with assaulting one Haji Mohd. Sidek bin Haji Salimullah, an offence under section 352 of the Penal Code. He was tried on 5th July, 1961, and convicted and sentenced to pay a fine of $75 in default one month's imprisonment. This appeal is against both conviction and sentence.

Among other grounds of appeal, it was urged on behalf of the appellant that he had retained counsel to defend him but on the day of the trial his counsel was ill. On 3rd July, 1961, counsel had sent a letter along with a medical certificate to the learned Magistrate. Counsel for the respondent had also been informed. A telegram was also sent on 4th July, 1961, to the President, Sessions Court, Raub, who was also the Magistrate in the case. The Magistrate, however, refused an application for an adjournment at the trial on the ground that "there had been many postponements already." It would appear from the record that both parties engaged counsel only in October 1960. There had been several adjournments before counsel appeared on the scene but there is nothing in the record to indicate at whose request these adjournments were applied for. Since counsel were engaged there had been several adjournments until the case was finally fixed for 5th July, 1961.

On 5th July, 1961, counsel for the respondent was agreeable to an adjournment provided his expenses were paid which the appellant was